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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

248

No. .....

JAMES E. LITTLE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

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Your petitioner, James E. Little, respectfully prays this Court for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, to Review a judgment of that Court in the above entitled cause being then numbered in that Court as Cause No. 17,401 (Criminal) and entered first on the 6th day of May, 1964 (Appendix, Exhibit B) but on rehearing, re-entered on a revised opinion on June 3, 1964 (Appendix, Exhibit D).

JUDGMENTS AND OPINIONS BELOW.

The initial Judgment below, in this case was the judgment of the District Court (No. 1) for the Eastern District of Missouri, Eastern Division, wherein the Court sentenced the petitioner (defendant) to be committed to serve four (4) years in the custody of the Attorney General on each of eight Counts, the sentences to run currently (Appendix, Exhibit A).

A timely appeal was filed to the United States Court of Appeals for the Eighth Circuit and after the filing of briefs and hearing arguments the said honorable Court rendered its decision and initial opinion on the 6th day of May, 1964 (Appendix, Exhibit B), and on petition for rehearing that Court entered an order amending the initial opinion but denying the Motion for Rehearing (Appendix, Exhibit C). This order was entered on the 3rd day of June, 1963.

It is this decision and opinion which your petitioner respectfully prays to be reviewed, set aside and reversed.

GROUNDS FOR INVOKING JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code. The petitioner urges that:

(a) The Court of Appeals for the Eighth Circuit has here rendered a Decision and Opinion contrary to principles and Opinions previously announced by the Supreme Court.

(b) The Court of Appeals for the Eighth Circuit has here rendered an Opinion in conflict with decisions and opinions of other United States Courts of Appeals on the same matters as those involved and decided in the Case at bar.

(c) The Court of Appeals for the Eighth Circuit has here rendered an Opinion involving an important question of Federal Law which has not been specifically settled but should be settled by this Court.

For the above reasons and on these grounds as more fully amplified below, your petitioner respectfully submits his prayer for a Writ of Certiorari to be issued to the United States Court of Appeals for the Eighth Circuit.

STATUTES CONFERRING JURISDICTION TO REVIEW.

§ 1254—Courts of Appeals; Certiorari; appeal; certified questions.

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree—**§ 1254 (1), Title 28, United States Code.**

STATUTE INVOLVED AND TO BE CONSTRUED IN CASE.

Title 15, U. S. C. 77q (a), also known as Section 15 of the Securities Act of 1933, which reads:

"77q. Fraudulent interstate transactions.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) To employ any device, scheme, or artifice to defraud, or

(2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

15 U. S. C. 77q (a) (1) (2) (3).

QUESTIONS PRESENTED FOR REVIEW.

Did each count of the Indictment set out a cause of action under Section 15 of The Securities Act of 1933, 15 U. S. C. 77q (a) (1), where the jurisdictional allegation is that a check was deposited to the defendant's credit in a bank in Tennessee and sent by that bank to Missouri for collection for its own account?

Is the proof of the deposit, with immediate credit to the defendant, of a check drawn on a Missouri Bank, deposited by the defendant in his Tennessee Bank, and drawn against by the defendant before the Tennessee Bank sent the checks to Missouri for collection, sufficient to create Federal jurisdiction and a violation of 15 U. S. C. 77q (a) (1), Section 15 of the Securities Act of 1933, where the Securities had been previously delivered by the defendant personally in Missouri after being prepared in Missouri?

Are the principles announced in the Cases of **Kann v. United States**[1] and **Parr v. United States**[2] concerning the use of the mails or interstate commerce as an es-

[1] Kann v. United States, 323 U. S. 88, 65 S. Ct. 148, 89 L. Ed. 88

[2] Parr v. United States, 363 U. S. 370, 80 S. Ct. 1171

sential part in the execution of a fraud, controlling in the consideration of a case under Section 15 of the Securities Act of 1933, 15 U. S. C. 77q (a) (1)?

Was the opinion of the United States Court of Appeals for the Eighth Circuit in this cause in conflict with the opinions of several of other United States Court of Appeals, such as the Ninth Circuit[1] and the United States Court of Appeals for the Fifth Circuit[2] and the United States Court of Appeals for the Seventh Circuit[3].

STATEMENT OF THE CASE.

The Indictment of the defendant, as it went to the jury on trial, contained eight counts, all identical except for the name of the alleged victims and the dates. The alleged victims, for the most part had been investing in oil leases in an oil field in Green County, Kentucky on the advice of friends and published news accounts in national magazines and trade journals which wrote glowing reports of this "shallow" field as one of the hottest in recent years. The Ashland Oil Company invested 3½ million dollars there to install a pipe line to Louisville. Later the defendant was hired as a salesman for the local St. Louis territory and he sold fractional interests for the Associated Drilling Co. While so engaged he purchased a tract of land, divided it into Blackburn A and Blackburn B leaseholds and sold fractional interests therein to his old customers under the name of Star Oil Co., for himself. He promised to drill two wells on each half and did have "Associated" drill and complete two wells on Blackburn A, but before he could drill any wells on Blackburn B, the "field" was shut down by the health authorities be-

[1] Carroll v. United States (1963), 326 F. 2d 72

[2] Getchell v. United States (1960), 282 F. 2d 68

[3] United States v. Schaffer (1962), 299 F. 2d 625 (7th)

cause of a salt-water problem and subsequently the "field" was virtually abandoned by all the prior investors, drillers, and developers. The customers, together with the defendant and Associated Drilling Co. and the developers all lost their capital investments. The defendant had also promised his customers that if the wells on Blackburn did not come in he would "put them" into other "producing acreage." The defendant spent some several months attempting to meet these promises but did not and when it became apparent that he had no "other producing" acreage available here, complaints were made to the Securities Agencies and the Federal Bureaus and the Indictment followed several years later. The Indictment charged that the defendant made fraudulent representations as to his own position with the Associated Drilling Co. and the oil production of the wells drilled, and what to expect from the newly opened acreage and that two wells would be drilled on the new acreage. These representations were allegedly made in person by the defendant, and after he sold the customers the "securities" he received checks in payment written against funds in Missouri Banks. It was charged that the federal laws were violated because the defendant deposited these checks in his Memphis Tennessee Bank, drew against this deposit and the Tennessee bank transported the checks back to Missouri for credit to its own account and payment.

The defendant's motions to dismiss the Indictment and for a directed verdict and for a new trial filed in proper sequence were all overruled. The jury found the defendant guilty on all eight counts. During the trial one of the jurors and a Government witness discussed some matters and socialized but at a hearing denied discussing the case specifically. The foreman of the petit jury was associated with a corporation with a financial position adverse to that represented by the defense counsels' firm of law-

yers in a civil suit but did not disclose this until after the trial.

The defendant's motions for a mistrial and for a New Trial were overruled and the defendant was sentenced to serve four years incarceration on each of the eight counts, to run concurrently. An appeal was duly filed to the United States Court of Appeals for the Eighth Circuit which "affirmed" and refused a rehearing on June 3, 1964.

REASONS FOR GRANTING THE WRIT.

(a)

The Decision and Opinion here of the Court of Appeals for the Eighth Circuit is in conflict with decisions of the Supreme Court of the United States, in matters involving the same legal principles.

The decisions by the Court of Appeals here is in direct conflict with the decision rendered by the United States Supreme Court in the Cases of Kann v. United States, 323 U. S. 88, 94, 65 S. Ct. 148, 150, where the court said:

> "The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any Consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme as the statutes require."

The Court of Appeals in the Case at bar said in its opinion:

> ". . . Appellant's argument that he is to be freed of such fraud because (the bank) National, upon

receipt of the checks in question, immediately credited Star's (defendant's) account and permitted him to withdraw funds so credited, before such checks were through the Federal Reserve Bank of St. Louis, is without merit."

These two statements are in conflict.

The Court of Appeals here in its opinion said of the defendant:

". . . That he knew and intended to have the above checks 'Cleared' and charged against the bank account of those investors cannot be in doubt. Therefore, appellant's device, scheme, and artifice, to defraud such duped investors was not dispelled by his deposit of their checks in National (this bank) and securing credit therefore."

This is in direct conflict with the principle established by the United States Supreme Court in **City of Douglas v. Federal Reserve Bank of Dallas, 217 U. S. 489, 492; 46 S. Ct. 554, 556, 70 L. Ed. 1051,** where it says:

"(W)hen paper is indorsed without restriction by a depositor, and is at once passed to his credit by the bank to which he delivers it, he becomes the creditor of the bank; the bank becomes the owner of the paper, and in making the collection is not the agent for the depositor."

The latter pronouncement of the Eighth Circuit Court, above, from the Opinion in this case, is definitely in conflict with the pronouncements of the Supreme Court covering the same principles, also, as recognized by Judge Learned Hand, in the case of **United States v. Taylor, 217 F. 2d 397, l. c. 398,** where he says of this situation:

"It recognized that in Kann v. United States, 323 U. S. 88, 65 S. Ct. 148, 89 L. Ed. 88, it had held that

> a swindler does not violate the 'Mail Fraud Act 3" when in pursuance of a fraudulent scheme he cashes in State A a cheeque dfawn upon a bank in State B although he knows it will be transported to State B."

The conflict between the Eighth Circuit Court of Appeals pronouncement and the Principles announced by the Supreme Court should be resolved, and the court should make it clear that the same principles announced as controlling in the "Mail Fraud Act" are also applicable to the "Securities Act", as some of the other Circuits have already discovered.

(b)

The Court of Appeals for the Eighth Circuit has here rendered an opinion in conflict with decisions and opinions of other United States Courts of Appeals on the same matters as those involved and decided in the Case at bar.

The Court here in its opinion said:

> "The *Kann* and *Parr* cases, *supra* cover prosecutions under the Mail Fraud Statute, 18 U. S. C. A. 1341, or conspiracy to do so, in violation of 18 U. S. C. A. 371. We do not consider the facts in those prosecutions, under the Mail Fraud Statute, to be wholly apposite to appellant's prosecutions for violation of Section 17 (a) of the Securities Act of 1933, supra."

This statement is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit in the case of **Carroll v. United States (1963-C. C. 9), 326 F. 2d 72.** Where the Indictment charged a violation of the Section 17 (a) of the Securities Act, the same see

tion involved in the case at bar. The Ninth Circuit Court said at points (20-21) ———

> "(20-21) . . . Kann v. United States (1944), 323 U. S. 88, 65 S. Ct. 148, 89 L. Ed. 88, is we think analogous. There, the Supreme Court pointed out that the fraudulent scheme involved (mail fraud) was completed when the defendant received the money that was intended to be obtained by their fraud, and that certain subsequent transactions (banking transactions) were merely incidental and collateral to it, and not a part of it."

The Eighth Circuit Court decided two things directly in conflict with that Ninth Circuit Court Case which decided that: (1) The scheme in a Securities Act Case and the scheme in a mail fraud case are both completed when the defendants receive the money and, (2) That the principles announced by the Supreme Court in the **Kann** Case are controlling in a Section 15 Securities Act Case as well as in a Mail fraud case.

The decision and opinion in the case at bar, by the Eighth Circuit Court is also in direct conflict with the principles and decision as announced by the Court of Appeals of the Fifth Circuit in the case of,

Getchell v. United States, 282 F. 2d 681 (1960—5 C. C.).

The Court in the opinion of the case at bar held the **Kann** and the **Parr** cases to be of a different generi than the cases which are brought under Section 15 of the Securities Act yet the Fifth Circuit Court treats these cases as controlling and applicable when it considers a violation under Section 15 when it says:

> ". . . Compare Parr v. United States, 363 U. S. 370, 80 S. Ct. 1171, 4 L. Ed. 1277. It was at most 'merely incidental and collateral to the alleged scheme

and not a part of it,' Kann v. United States, 1944, 323 U. S. 88, 95, 65 S. Ct. 141, 151, 89 L. Ed. 88."

Getchell v. United States, *supra*.

The Court in the Getchell case treats both the Securities Act violation and the mail fraud violations to be governed by the principles of **Kann** and **Parr.** This is directly in conflict with the decision and opinion in the case at bar by the Eighth Circuit Court of Appeals.

(c)

The Court of Appeals for the Eighth Circuit has here rendered an opinion, which takes the position that there is a distinct difference in the principles applicable to consideration of the violations under the Securities Act, from those under the Mail Fraud Act, as related to the use of the mails or interstate transportation of checks deposited for immediate credit in a bank. As the Court said in its opinion in this case:

> "There can be no question about the proof essential to sustain convictions under the Mail Fraud Act, as considered in **Kann, Parr,** and other cases cited by Appellant, supra. But we are not here concerned with a prosecution for 'mail fraud'."

The court in a few paragraphs further on, says:

> **"So considered, the crucial question presented by this appeal is whether the clearance of the duped investors' checks through National and the Federal Reserve Bank in St. Louis, was either a 'direct or indirect use of the mails' by appellant in execution of his scheme to defraud, as established by the evidence here."**

Therefore, if the evidence in this case was to the effect that the defendant deposited the investor's checks in the

Tennessee bank and received credit immediately in his account or drew cash against them immediately, the same day (and it was), then the situation extant in the Taylor case, supra, and the Kann and Parr cases, supra, is being subjected to a new, novel and rejected theory.

Unfortunately, we could find no case where the United States Supreme Court has definitely stated that the same principles applied in the "Mail Fraud" cases of Kann and Parr apply to the "Securities Act" cases in determining federal jurisdiction in situations such as this, and the question should be decided, since it does give rise to some confusion and conflict among the Circuit Courts.

CONCLUSION.

For all of the above reasons and grounds and to insure uniform interpretations and principles of law applicable to all defendants in all the fifty States and Federal Districts, and to insure a fair trial to this defendant and to others indicted or charged with violations of the Securities Act of 1933, this defendant prays the Supreme Court to issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review the decision in this case, and this the defendant will ever pray.

Respectfully submitted,

MALCOLM FRANK and

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APPENDIX.

Judgment and Commitment.

(Filed June 17, 1963, Harold G. Pryce, Clerk, U. S. District Court, E. Dist. of Mo., St. Louis.)

United States District Court
For the Eastern District of Missouri,
Eastern Division.

United States of America
v.
James E. Little.
} No. 62Cr256(1).

On this 17th day of June, 1963, came the attorney for the government and the defendant appeared in person and with Murray Randall, his attorney.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, entered February 1, 1963, and a jury verdict of guilty, entered April 19, 1963, of the offenses of knowingly, willfully and unlawfully employing a device, scheme and artifice to defraud certain investors in oil and gas leases, and using means and instruments of transportation and communication in interstate commerce in pursuance of aforesaid scheme:

In violation of Sec. 77q (a) T. 15 U. S. Code, as charged in each of counts One, Two, Four, Five, Six, Seven, Eight and Nine of Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS as to and under the charge contained in each of Counts 1, 2, 4, 5, 6, 7, 8 and 9 of Indictment, such terms to begin, run and terminate concurrently with each other.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Roy W. Harper,
Roy W. Harper,
United States District Judge.

Harold G. Pryce,
Clerk.

(By) Ellen C. Donovan,
Deputy Clerk.

Judgment.

(Filed May 6, 1964, Robert C. Tucker, Clerk.)

United States Court of Appeals
For the Eighth Circuit

No. 17,401, September Term, 1963.

James E. Little,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further ordered by this Court that the defendant in the said District Court, James E. Little, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

May 6, 1964.

Order entered in accordance
with Opinion:—

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

Opinion of the Court of Appeals.

United States Court of Appeals
For the Eighth Circuit.

No. 17,491.

James E. Little, Appellant. v. United States of America, Appellee.	Appeal from the United States District Court for the Eastern District of Missouri.

[May 6, 1964.]

Before Van Oosterhout, Ridge and Mehaffy, Circuit Judges.

Ridge, Circuit Judge.

Appellant was convicted on eight (8) of the ten (10) counts of an indictment duly returned, charging violations

of Section 17(a) of the "Securities Act of 1933."[1] 15 U. S. C. A. 77 q (a). He appeals from concurrent sentences imposed therefor. Two counts of the indictment were dismissed by the Government before their submission to the jury.

The primary issue raised and to be resolved in this timely appeal relates to the "use of the mails, directly or indirectly" to bring appellant's violations of the Securities Act, *supra*, as a crime within federal jurisdiction. As that issue is here presented there is no question as to the sufficiency of the evidence to establish fraudulent representations as having been made by appellant to induce certain identified investors to purchase specifically described worthless "securities"[2] as detailed in each count of the indictment on which he was found guilty. Hence it is sufficient to presently state that on the evidence adduced, the Government established facts from which the jury could have found, beyond a reasonable doubt, that appellant, at all times here material, did knowingly and intentionally make certain false and untrue statements to induce identified investors, living in St. Louis County, Missouri, who had checking accounts with banks situate in that State, to deliver to him checks drawn on such banks, payable to the Star Oil Company, as a means of purchasing worth-

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[1] 15 U. S. C. A. 77q (a): "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

[2] "Fractional undivided interest in oil" leases. § 77 (b) (1), T. 15, U. S. C. A.

less, fractional interests in oil and gas leases, described as "Blackburn Leases A and B," located in Green County, Kentucky. None of the material representations established as inducing such investors to make those purchases were true. As a consequence, appellant was duly indicted for violation of Section 17 (a) of the Securities Act, *supra*.

In each count of the indictment returned; it was specifically charged; among other things, that appellant by the use of the means and instruments of transportation and communication in interstate commerce"—did—"unlawfully, willfully and knowingly—employ (a) device, scheme and artifice to defraud and obtain money and property" from the person duped, by "unlawfully, willfully and knowingly" causing a check, identified in each count of the indictment, "to be delivered by the means and instruments of transportation in interstate commerce—from Memphis, Tennessee, to Federal Reserve Bank of St. Louis, St. Louis, Missouri,"—payable against the account of the duped investor—which check appellant "deposited with the National Bank of Commerce in Memphis, Memphis, Tennessee" (hereinafter called "National"), all "in violation of Section 77q (a)," *supra*.

It was on February 9, 1959, that appellant opened a checking account under the name of Star Oil Company[3]

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[3] The Star Oil Company was organized February 7, 1959. Its incorporators were three attorneys in the office of counsel employed by appellant to secure the incorporation of Star. The record before us is silent as to the capital structure, if any, of Star at time of incorporation. The stock record book of Star, introduced as an exhibit, reveals one certificate for 1,000 shares, issued in the name of appellant, but "never 'actually executed" by any officer of Star.

From the testimony of appellant it appears that he was president and his wife was secretary. Obviously, the "doctrine of corporate alter ego" is clearly applicable here. (Cf. *Geary v. Cain*, 70 Utah 268, 9 P. 2d 396, 398.)

The legal fiction of Star Oil Company should be ignored, "to prevent fraud and accomplish justice" under the facts established in the case at bar.

with National. Each of the checks received by appellant from the duped investors was, by false representation, made payable to "Star", at the specific direction of appellant and accordingly deposited by him in "Star's" checking account. Though appellant admittedly transported such checks from St. Louis, Missouri, to Memphis, Tennessee,—to bring him criminally within the ambit of Section 17(a), *supra*, each count of the indictment only charged a "transportation in interstate commerce" of each such check by "means and instruments of transportation and communication in interstate commerce—from Memphis, Tennessee, to St. Louis, Missouri." The various counts of the indictment alleged the transportation to be either "via the "Railway Express Agency" or by "United States Mail."

The Government's evidence established each of the checks was deposited with National, in respect to deposit slips which established that National acted only as Star's collection agent in securing the proceeds of the checks. All such checks were received by National for deposit "with the distinct understanding that credit" thereof to Star's checking account was "subject to final payment and to receipt of proceeds of final payment in cash or solvent credit" to National, "at its own office." Notwithstanding such contractual conditions, it is appellant's contention that the checks "were not deposited for collection" but that National became a "holder in due course" thereof. Hence he says he may not be held responsible for National's transportation of the checks for "clearance" which admittedly he knew would be by use of the "mails" or other means of interstate commerce. More specifically, it is appellant's contention that because it was National's practice, unless overdrafts appeared, to immediately credit Star's checking account with the amount of the duped depositor's checks, as and when they were deposited, and appellant was allowed to make withdrawals from such ac-

count, against the amount so credited, before the duped investor's check was "cleared" through the Federal Reserve Bank of St. Louis, he cannot be found guilty of violating Section 17(a), *supra*. So contending, appellant argues that under the law relating to "bills and notes" and "banking"—National thereby became a "holder in due course" as to each such check when it was deposited with National. Under such circumstances, appellant asserts, "the mailing or transportation" of the checks here considered could not have been caused by him, "directly or indirectly"; and that under the above circumstances National, as a matter of law, cannot be considered as being an agent for or on his behalf, as the Government here contends.

It is on the above singular hypothesis that appellant asserts he cannot be found guilty of violating Section 17 (a), *supra*, and seeks to have his convictions set aside. As support therefor, appellant relies on the following authorities: **Kann v. United States**, 323 U. S. 89 (1944); **Parr v. United States**, 363 U. S. 370 (1960); **Douglas v. Federal Reserve Bank of Dallas**, 271 U. S. 489 (1926); **United States v. Schaefer**, 299 F. 2d 625 (7 Cir. 1962), cert. den. 370 U. S. 917; **Getchell v. United States**, 282 F. 2d 681 (5 Cir. 1960); **Lowrance Motor Co. v. First National Bank**, 238 F. 2d 625 (5 Cir. 1956); **United States v. Taylor**, 217 F. 2d 397, 398 (2 Cir. 1954); **Harper v. United States**, 143 F. 2d 795 (8 Cir. 1944); **Darwin v. Jess Hickey Oil Corp.**, 153 F. Supp. 667 (D. C. N. D. Texas, 1957).

We shall not follow appellant in all the argument he undertakes to make and which he attempts to fortify by the above-cited authorities. That the contention made by appellant is not apposite to the crimes for which he was charged and found guilty; and, that the above-cited authorities pertaining to mail "fraud prosecutions," and other violations of the Securities Act of 1933 are patently

distinguishable on their facts and law applicable, is made manifest when the following propositions are contemplated and properly postulated.

The **Kann** and **Parr** cases, *supra*, cover prosecutions under the Mail Fraud Statute, 18 U. S. C. A. 1341; or conspiracy to do so, in violation of 18 U. S. C. A. 371. We do not consider the facts in those prosecutions, under the Mail Fraud Statute, to be wholly apposite to appellant's prosecutions for violation of Section 17 (a) of the Securities Act of 1933, *supra*. There can be no question about the proof essential to sustain convictions under the Mail Fraud Act, as considered in **Kann, Parr,** and other cases cited by appellant, *supra*. But we are not here concerned with a prosecution for "mail fraud."

As we said in **Harper v. United States,** 143 F. 2d 795, 801 (8 Cir. 1944):

> "The devising of a scheme or artifice to defraud or to **obtain** money by means of fraud or false pretenses is not a crime either under the Securities Act or the Mail Fraud Act. It becomes a crime only in the event that in furtherance of the scheme or artifice to sell securities **any** means or instruments of transportation or communication in interstate commerce or the mails be employed." (Emp. added.)

More recently, we said in **Creswell-Keith, Inc. v. Willingham,** 264 F. 2d 76, 80 (8 Cir. 1959):

> "The courts have uniformly held that (the Securities Act of 1933) applies when the mails are used in furtherance of a fraudulent scheme, irrespective of whether the misrepresentations were transmitted by mail or in interstate commerce.
>
> "* * * It is our best judgment that Congress inserted the mails and interstate commerce provision in (the Securities Act of 1933) for the purpose of establish-

> ing federal jurisdiction, and that Congress intended to assert its full constitutional power in granting civil relief from fraudulent transactions." (par. added.)

when related to the **sale** of worthless securities, as defined in that Act. We think that is true also as to the criminal sanctions provided in Section 17(a), *supra*.

The "evil at which the Securities Act is directed is the fraud in the **sale** of securities." **United States v. Cashin**, 281 F. 2d 669, 674 (2 Cir. 1960). That being the congressional purpose and intendment to be covered by the "Securities Act of 1933," *a fortiori*, the law of "sales" and impact of fraud in relation to "sales," rather than the principles of "banks and banking" or "bills and notes," should be considered in making practical application of that Act to a given set of facts. In other words, it is our opinion that a scheme to defraud, in relation to a sale of securities, and the use of the mails in consummation thereof, is the gist of the crime denounced by the Congress in Section 17(a) of the Securities Act of 1933, *supra*. Under that Act, the use of the mails need not be central to the scheme to defraud (Cf. **United States v. Sampson**, 371 U. S. 75 (1962); **Pereira v. United States**, 347 U. S. 1 (1954); **United States v. Sheridan**, 329 U. S. 379 (1946); **United States v. Cashin**, *supra*; **United States v. Monjar**, 47 F. Supp. 421 (D. C. Del. 1942), aff'd 147 F. 2d 916 (3 Cir. 1944), cert. den. 325 U. S. 859 (1945).) It is sufficient if the use of the mails is merely incidental to the fraudulent conduct which the Congress intended to reach and punish by the provisions of the Securities Act of 1933. **Pereira v. United States**, *supra*; **United States v. Robertson**, 181 F. Supp. 158 (S. D. N. Y. 1959), aff'd in part and reversed in part, **United States v. Robertson**, 298 F. 2d 739 (2 Cir. 1962).

So considered, the crucial question presented by this appeal is whether the clearance of the duped investors'

checks through National and the Federal Reserve Bank in St. Louis, was either a "direct or indirect use of the mails" by appellant in execution of his scheme to defraud, as established by the evidence here. Appellant's argument that he is to be freed of such fraud because National, upon receipt of the checks in question, immediately credited Star's account and permitted him to withdraw funds so credited, before such checks were cleared through the Federal Reserve Bank of St. Louis, is without any merit. The established fact is that appellant utilized National, and, through it, "means" of "interstate transportation—or—the use of mails, directly or indirectly," to have checks which he obtained as one step in his scheme to defraud investors of their money. That he knew and intended to have the above checks "cleared" and charged against the bank account of those investors cannot be in doubt. Therefore, appellant's device, scheme, and artifice to defraud such duped investors was not dispelled by his deposit of their checks in National and securing credit therefor. **Hart, et al. v. United States**, 112 F. 2d 128 (5 Cir. 1940), cert. dis. 311 U. S. 722; cert. den. 311 U. S. 684; rehear. den. 311 U. S. 726. Regardless of the language on the deposit slips and the relationship thereby created between National, Star, and appellant, the fact is that appellant's criminal conduct and intention was centrally established to be for a singular purpose, i. e., to defraud the duped purchaser, not of a "check" but of "money" as disclosed by the course of conduct appellant pursued. The gist of his fraud was to sell worthless, undivided interests in oil and gas leases and receive money from the persons whom he intended to defraud, by way of checks which he knew and intended should and would be cleared in the usual course of business and charged against their individual bank accounts in payment for the worthless securities he sold them. Under such a scheme the "impact" of his fraud on such investors did not with finality occur until the checks he

obtained from them, as a step in his unlawful scheme and artifice, reached the investor's bank and the sum of the check was charged against the duped investor's bank account. Then, and only then, did the impact of appellant's fraud fall upon those whom he intended to, and did, defraud.

In **Pereira v. United States**, *supra*, l. c. 8-9, it is said:

> "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."

Pereira, and **Hart v. United States**, *supra*, are particularly applicable to the facts here, for:

> "Unless the parties otherwise agree, either expressly or by implication, the giving of a check for goods purchased usually is only a conditional payment, whether the check is drawn on the buyer's account or on the account of another, provided it is not accepted as an absolute payment.—Ordinarily, in a sale for cash, a check is not payment until it is actually paid." Sales: § 238 (b), 77 C. J. S., 1014-1015.
>
> "Under the Uniform Negotiable Instruments Act, the provision, which has been applied in a number of cases (civil and criminal), is that a check, of itself, does not operate as an assignment of any part of the funds to the credit of the drawer with (his) bank." (Par. added.) 10 Am. Jur. 2d, § 562, p. 531. See also, § 3-409, Uniform Commercial Code, sub. (1).

Section 17(a) of the Securities Act of 1933, *supra*, is clear—if the mail is "used in employing the scheme, however incidental the mailing may be"; a prosecution thereunder may be sustained (**United States v. Schaefer**, 299 F. 2d, l. c. 630); and it is particularly recognized that prose-

cutions under that Act are "broader" than those under the Mail Fraud Statute, "depending on whether fraud or the use of the mails is considered to be the gist of the offense" as proscribed by Section 17 (a), *supra* (Cf. **Getchell v. United States**, 282 F. 2d 684.)

That the scheme to defraud is the evil intended to be controlled and remedied by passage of the Securities Act, *supra*, cannot be in doubt, in the light of what is said in **Wilko v. Swan**, 346 U. S. 430-431 (1953). There, Mr. Justice Reed stated:

> "In response to a Presidential message urging there be added to the ancient rule of *caveat emptor* the further doctrine of 'let the seller also beware,' Congress passed the Securities Act of 1933. Designed to protect investors, the Act requires issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale."

Our conclusion reached in **Creswell-Keith, Inc. v. Willingham**, *supra*, is wholly compatible with the congressional intendment of the Securities Act of 1933, *supra*. It has been followed in **United States v. Cashin**, *supra*; **United States v. Robertson**, *supra*; **United States v. Hughes**, 195 F. Supp. 795 (D. C. S. D. N. Y. 1961). Cf. also, **Roe v. United States**, 316 F. 2d 617 (5 Cir. 1963). Since the dominant purpose of the Securities Act was to prevent the victimizing of investors, a defrauder may not evade prosecution thereunder if he takes a check and negotiates the same to secure the money he wanted, where any medium of interstate commerce, "directly or indirectly" is used for that fraudulent purpose. It is here clearly established that appellant knew the "mails would be used directly or indirectly" in carrying the impact of his fraud to those he intended to victimize. Looking at those transactions in their entirety and reality, it is our opinion that when

appellant deposited the defrauded investors' checks at National he could only have contemplated that in due course, and as a direct result of such action, the mails or other means of interstate commerce would be used to complete the fraud he intended to perpetrate in the sale of the securities as here to be considered. Cf. **United States v. Doran**, 299 F. 2d 511, l. c. 515 (1962).

There is no merit to appellant's contention that the indictment returned against him, and each count thereof, was insufficient to state a crime under Section 17 (a) of the Securities Act of 1933; nor that the evidence was insufficient to establish federal jurisdiction over such crime, or to support his verdict of guilty.

Appellant, by after-trial motion timely filed, seeks another trial on such indictment because of alleged juror misconduct. The first assignment so made relates to a conversation Donald Dunn, one of the jury at defendant's trial, had with Fred W. Rowe, III, a Government witness. It occurred in the Coffee Shop in the Federal Courthouse in St. Louis, Missouri, during appellant's trial. Upon being informed thereof, prior to return of the jury's verdict in this case,—District Judge Harper, in open court in the presence of defendant and the assembled jury, stated:

> "A matter has arisen which I think that I should inquire of you individually about. It has been suggested that someone on the jury may have discussed or talked to one of the witnesses in this case, and would you just give me a yes or no answer as I call the list?"

Upon poll of the jury, Juror Dunn answered, "Yes". Upon specific inquiry by Judge Harper, made before the jury's verdict was received, addressed to Juror Dunn: "Did you discuss in any way the matter of the case?" a

negative answer was received from Juror Dunn. Counsel for appellant was thereupon permitted to propound more specific questions to Juror Dunn. Upon being satisfied after such inquiry that there was no "conversation of any nature concerning this case" between Juror Dunn and the witness, Rowe, the jury's verdict was received by the Court. Thereafter, and after motion for new trial was timely filed, a more specific and exhaustive hearing was held by Judge Harper on the two assignments appellant makes as to juror misconduct. At that hearing, counsel for both parties, by way of cross-examination, extensively probed such assignments of error, particularly as to Juror Dunn's conversation with Rowe; as well as appellant's assignment of error made in relation to the alleged failure of Juror Eilermann, foreman of appellant's jury, to disclose on voir dire examination acquaintance or business dealings he may have had with Mr. Morris A. Shenker, senior member of the law firm of which appellant's trial counsel was a member.

It appears in this record that the law firm of counsel for appellant had some previous litigation in which Eilermann Transfer Company and Ace Cab Company were involved. Mr. Eilermann on voir dire examination, disclosed that he was Vice President and Secretary of the Eilermann Transfer Company. Notwithstanding, it is appellant's counsel's contention that Mr. Eilermann failed to disclose the pendency of the litigation in which Ace Cab Company and Eilermann Transfer Company were parties. The record does not reveal whether they were opposing or joint parties to that action. However, it does appear that Eilermann Transfer Company was represented by counsel for a liability insurer in respect to that action. The firm of Morris A. Shenker and Associates represented Ace Cab Company. It was Juror Eilermann's testimony at the post-trial hearing that he did not know that Mr.

Shenker or his associates were counsel for Ace Cab Company, and there is not a particle of evidence in the record before us ever suggesting a chimera suspicion *contra*.

As to the conversation Juror Dunn had with Rowe, a reasonable inference to be made from the record here is that the only matters discussed between those parties concerned the weather in St. Louis, perhaps, the making of whiskey, and horse racing in Kentucky where Rowe resided. But, in the course of the conversation, it is established that some reference was made either by Mr. Rowe or Juror Dunn, relative to "this mess upstairs."

We have meticulously examined in the record before us all that relates to the above assignments of error. We, like District Judge Harper, can find no merit to appellant's claim of reversible error as a consequence of either situation.

We are cognizant that:

> "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to defendant." **Remmer v. United States**, 347 U. S. 227, 229 (1954).

We are also mindful that what influences a particular juror in every situation necessarily is vague and indefinite.

However, it is well settled that what is prejudicial to a fair trial when the issue of "juror misconduct" is raised, is a matter that must, to a large extent, be left to the discretion of a trial court and that an appellate court will not

reverse the determination of that court on such an issue unless it is established as clearly erroneous. **Mattox v. United States**, 146 U. S. 140, 147; **Wheaton v. United States**, 133 F. 2d 522 (8 Cir. 1943); **United States v. Flynn**, 216 F. 2d 354 (2 Cir. 1954); **Holmes v. United States**, 284 F. 2d 716 (4 Cir. 1960).

In the **Wheaton** case, *supra*, Judge Sanborn, speaking for this Court, said:

> ". . . Communications, relative to a case on trial, between jurors and third persons, or witnesses, or the officer in charge of the jury, are absolutely forbidden, and if it appears that such communications have taken place, . . . there is a rebuttable legal presumption that (such communications) were prejudicial . . . ."

Under the facts here, we think that any presumption of prejudice that might exist because of Juror Dunn's conversation with Rowe has been clearly rebutted.

As to the assignment of error regarding Juror Eilermann, we are not persuaded that Judge Harper's ruling thereon was "clearly erroneous." Cf. **Stanczak v. Penn. R. Co.**, 174 F. 2d 43, 48 (7 Cir. 1949); **Christian v. Hertz Corp.**, 313 F. 2d 174 (7 Cir. 1963); **Brown v. New York Indemnity Co.**, 39 F. 2d 443 (8 Cir. 1930).

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Filed June 3, 1964; Robert C. Tucker, Clerk.)

United States Court of Appeals
for the Eighth Circuit.

No. 17401.

James E. Little,

Appellant,

v.

Order.

United States of America,

Appellee.

On the Court's own motion, the last paragraph of the opinion filed in the case at bar on May 6, 1964, is stricken therefrom.

Appellant's motion for rehearing is denied.

June 3, 1964.

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742-051—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 248

JAMES E. LITTLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. VIII, 1–15; Pet. App. 15–28) is reported at 331 F. 2d 287.[1]

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1964 (Vol. VIII, 16; Pet. App. 14–15). A petition for rehearing was denied on June 3, 1964 (Vol. VIII, 30; Pet. App. 29). The petition for a

[1] The record consists of eight volumes. Volumes II through VII, which are consecutively paginated, constitute the reporter's transcript of the trial, to which reference is made as "Tr." Volumes I and VIII, which are separately paginated, contain proceedings in the district court and the court of appeals, respectively, and are referred to by volume number.

writ of certiorari was filed on July 3, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution under Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), the jurisdictional requirement that the mails or interstate facilities be used in connection with the scheme to defraud in the offer and sale of securities is satisfied by proof that the defendant's bank forwarded checks of duped investors to banks in another State for collection.

STATUTE INVOLVED

Section 17(a) of the Securities Act of 1933, 48 Stat. 84, as amended, 68 Stat. 686, 15 U.S.C. 77q(a), provides:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud;
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.
>
> * * * *

STATEMENT

After a trial by jury in the United States District Court for the Eastern District of Missouri, petitioner was convicted on eight counts of an indictment which charged him with the fraudulent sale of fractional interests in oil leases through use of the mails and interstate transportation or communication facilities, violations of Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a) (Tr. 1076–1077; Vol. I, 1–14, 39). He was sentenced to concurrent terms of imprisonment of four years on each of the counts (Tr. 1121; Pet. App. 13–14). The court of appeals unanimously affirmed (Vol. VIII, 1–15; Pet. App. 15–28). 331 F. 2d 287.

1. The evidence showed that during 1958 and 1959 petitioner was employed as an oil lease salesman for the Associated Drilling Corporation, and that he worked primarily in the St. Louis, Missouri, area (Tr. 22, 24, 56). Associated owned a number of oil leases in Green County, Kentucky, one of which was the Blackburn lease consisting of some 65 acres of land (Tr. 25–27).

In February 1959, the Star Oil Company was incorporated at petitioner's behest, and he became president (Tr. 512, 813–814, 819–820). Shortly thereafter, Associated assigned 25 acres of its Blackburn lease to the petitioner for $25,000 (Tr. 28, 39–40, 42). Petitioner subdivided the 25 acres into two tracts known as Blackburn "A" and Blackburn "B." During this period, Associated drilled two oil wells on Blackburn "A," the cost of which was included in the $25,000 (Tr. 42–43). The wells did not strike oil in any commercial quantity

and pumped only salt water (Tr. 42–43; see Tr. 127, 132–133, 233). No wells were drilled on Blackburn "B" (Tr. 42–43).

In February and March 1959, petitioner sold fractional interests in oil leases of Blackburn "A" to investors in the St. Louis area. In March and April 1959, petitioner sold similar interests in Blackburn "B" to the same investors as well as to some new investors in the St. Louis area. He told the "B" investors that Blackburn "A" was producing oil, and, to most of these people, he said that the quantity was about 100 barrels per day (Tr. 228, 232–233, 270–271, 296, 326, 338, 352, 357, 402, 433–435, 490, 560–563). Petitioner told one investor that Blackburn "A" had a "good well" which was worth at least $10,000 (Tr. 358). He told another investor that Blackburn "A" had "come in," and that it was producing "in excess of 200 barrels a day" (Tr. 402).[2] The sales were transacted face-to-face, with petitioner in most instances receiving the checks personally at the conclusion of the sales. On petitioner's instructions, the checks were made payable to the Star Oil Company, which petitioner told several investors was either "connected" or "one and the same" with the Associated Drilling Corporation (Tr. 273–274, 293, 356, 437). The leases were drawn up in the name of Associated, with petitioner signing them as vice-president of Associated (Tr. 98–99, 354–355).[3] The investors received no return on their investments,

[2] From figures supplied by the petitioner, one investor of Blackburn "B" was led to believe that his oil royalties would be between $160 and $190 per month (Tr. 326).

[3] Petitioner was not a vice-president of Associated and had no authority to use Associated's name in selling his leasehold

and lost their capital (Tr. 274, 340, 360, 403, 439, 492, 564).

Petitioner opened a checking account for the Star Oil Company at the National Bank of Commerce in Memphis, Tennessee (Tr. 510–511). He deposited in Star's account the various checks he received (ranging between $1,200 and $3,200 per investment sold) from the St. Louis investors (Tr. 514–518). These checks were credited to Star's account and handled for collection (Tr. 525–526). Although the deposit slips provided for conditional credit until the bank had collected the items deposited, the petitioner was allowed to write checks against those deposits prior to collection (Tr. 532, 534, 535; see Tr. 525–526). A vice president of the bank testified that the petitioner "was allowed to do that, but, in turn, it was not with the bank's knowledge. The only way we would have knowledge of it is if it had shown an overdraft and the overdraft had come to our attention. If we had had enough of them come in, then we would have put [petitioner] on strict collection items" (Tr. 534; see Tr. 535).

The checks which were drawn on banks in St. Louis were taken by messenger to the Federal Reserve Bank in Memphis (Tr. 518, 525). From there, the checks were sent by air express to the Federal Reserve Bank in St. Louis for eventual clearing and collection (Tr.

interests in Blackburn (Tr. 24, 98–99, 167). Star was not a branch or connected in any way with Associated; and there had been no talk among Associated officials of any merger or combination with Star (Tr. 44, 102–103, 168).

540–541, 550, 553–555). The checks which were drawn on banks in suburban St. Louis or in St. Louis County were either mailed or sent by air express from petitioner's bank in Memphis to the Mercantile Trust Company in St. Louis, a correspondent bank, for clearing and collection (Tr. 518, 523–525, 537–538, 556, 558).

2. In its instructions to the jury, the court read the pertinent provisions of 15 U.S.C. 77q(a) and either read or paraphrased the various counts of the indictment (Tr. 1035–1046). After explaining the positions of the government and the defendant (Tr. 1050–1051), the court said, in part (Tr. 1055–1056):

> There is one thing that is common to these counts, and it is a contested fact in this case, and that is whether or not the proof shows that the defendant used or caused to be used the Railway Express Agency from Memphis, Tennessee, to the Federal Reserve Bank of St. Louis, Missouri, with respect to Counts 1, 2, 4 and 5, and whether the defendant used or caused to be placed documents in the United States mail with respect to Counts 6, 7, 8 and 9. * * * [I]t is necessary for the testimony to convince you that the defendant could foresee that his actions would cause documents to be placed with the Railway Express Agency with respect to Counts 1, 2, 4 and 5, and documents to be placed in the mails with respect to Counts 6, 7, 8 and 9, and that they were so placed in the offer and sale of a fractional undivided working interest in the so-called Blackburn B lease.

Later, the court charged (Tr. 1066):

> In order to convict the defendant under any of the counts in which he is charged you must find beyond a reasonable doubt all of the following propositions: (1) That a scheme was devised as charged in the indictment and as submitted to you in these instructions; (2) that the defendant under consideration either devised the scheme or knowingly and intentionally participated in the execution thereof; (3) that the Railway Express Agency was used as a natural and probabl[e] consequence in the execution of the scheme as specified in Counts 1, 2, 4 and 5, and that the mails were used as a natural and probable consequence in the execution of the scheme as specified in Counts 6, 7, 8 and 9; and (4) that the defendant acted with knowledge of the illegal nature of the scheme as charged in the indictment and as submitted to you in these instructions.

ARGUMENT

Relying primarily upon this Court's decision in *Kann* v. *United States*, 323 U.S. 88, a mail fraud prosecution, petitioner contends (Pet. 7–12) that his bank's use of the mail and interstate air express in transmitting the checks of the duped investors from Tennessee to the Missouri banks for payment was insufficient to establish the requisite federal jurisdiction under Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), *supra*. As we show *infra*, his contention would not be valid even in mail fraud prosecution. It is clearly without merit in a prosecution under Section 77q(a) of the Securities

Act where the gist of the offense is fraud in the sale of securities, and the use of the mails or interstate facilities is merely the factor which supports federal jurisdiction. *E.g., United States* v. *Cashin,* 281 F. 2d 669, 673 (C.A. 2). The court below was correct in holding (Pet. App. 21) that "the use of the mails need not be central to the scheme to defraud," it being "sufficient if the use of the mails is merely incidental to the fraudulent conduct which the Congress intended to reach and punish by the provisions of the Securities Act of 1933." The difference between this statute and mail fraud is similar to that which this Court recognized in *United States* v. *Sheridan,* 329 U.S. 379, when it held, after *Kann,* that causing the mailing of a check violated the statute punishing the transportation of fraudulent securities (now 18 U.S.C. 2314) even though the defendant had received the full proceeds of the check before the mailing occurred.

In the instant case, there can be no question that the petitioner instituted a scheme to defraud in the sale of securities. The use of the mails and interstate air express by petitioner's Tennessee bank in transmitting the checks to Missouri for payment was essential to the consummation of the fraud upon the investors. The sales of securities were not complete until the investors' checks were paid by their banks and charged against their respective accounts, for, until paid, the investors could frustrate the scheme simply by stopping payment on their respective checks. Until the investors' respective bank accounts were charged with the checks, the investors did not

irrevocably part with their money and petitioner did not irrevocably receive the same. Thus the mails and interstate facilities were used in the sale of securities.*

Moreover, even if this were a mail fraud prosecution, the sending of the checks would be in execution of the scheme to defraud. This Court said in *United States* v. *Sampson*, 371 U.S. 75, 80:

> We are unable to find anything in either the *Kann* or the *Parr* case which suggests that the Court was laying down an automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be "for the purpose of executing" the defendants' scheme. Rather the Court found only that under the facts in those cases the schemes had been fully executed before the mails were used. And Court of Appeals decisions rendered both before and after *Kann* have followed the view that subsequent mailings can in some circum-

* Petitioner's reliance upon *Carroll* v. *United States*, 326 F. 2d 72 (C.A. 9), and *Getchell* v. *United States*, 282 F. 2d 681 (C.A. 5), is misplaced. In *Carroll*, the court held that since the mailings in a Section 17(a) prosecution were not part of the offense under that Section but were simply required for jurisdictional purposes, the statute of limitations ran from the time that the defendants received the money through their fraudulent scheme and not from the time that the incidental banking transactions which followed took place. The case supports the decision below in holding "that while the mailing requirement is jurisdictional, it is not the essence of the offense [under Section 17(a) of the Securities Act] and may be merely incidental to it." 326 F. 2d at 86. In *Getchell* the court specifically stated it was not deciding a "question of statutory construction." It rested its decision on the language of the indictment, which indicated that defendants were *charged* with making misrepresentations in the letter that had been mailed. 282 F. 2d at 684.

stances provide the basis for an indictment under the mail fraud statutes.

On the facts here, even if one accepts the argument that permission to draw on the funds rendered the bank a holder in due course on each check, the mailings were in execution of the fraud. Petitioner would not have been allowed to draw on subsequent checks—indeed he probably would not have been able to continue in business at all—if the earlier checks did not clear. The scheme, in short, "was not limited to obtaining the purchase price from any particular purchaser. The scheme demanded continuity." *Cacy* v. *United States*, 298 F. 2d 227, 230 (C.A. 9).

This is not a case, like *Kann*, where the defendant had no interest in what occurred after he got his money on one particular scheme to defraud. Here the scheme had not reached fruition with the deposit of any particular check or checks; the consummation of later individual frauds and the scheme as a whole depended upon interstate transmittal of the checks to the drawee banks for payment.

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 248.

JAMES E. LITTLE,
Petitioner,
v.
UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY

To Brief for the United States in Opposition to the Petition for a Writ of Certiorari.

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REPLY

To Brief for the United States in Opposition to the Petition for a Writ of Certiorari.

In resisting certiorari in the present case, the Government demonstrates it does not comprehend this Court's opinion in **Kann v. United States**, 323 U. S. 88 (1944). Petitioner submits that the principles of the **Kann** case require that petitioner's conviction be reversed.

1. Petitioner was convicted under Section 17 (a) of the Securities Act of 1933, entitled "Fraudulent Interstate Transactions." There are two elements to this offense—(1) did petitioner use interstate facilities (or the mails) either directly or indirectly, and if so, (2) was his use of

the mails in execution of a scheme to defraud or in the employment of a scheme to defraud?

Did petitioner directly or indirectly use the mails or interstate commerce? This Court said in the **Kann** case, *supra*, at page 93:

> "... while there may be some question as to whether the defendants may be said to have caused' the mailing of the checks, we think it a fair inference that these defendants who ... cashed the checks believed that the banks which took them would mail them to the banks on which they were drawn ..."

Thus it is clear that the petitioner "directly or indirectly" used the mails or "caused" the use of the mails when he deposited the checks in his bank knowing they would be mailed for clearance to the investors' banks.

But, was the use of the mails "in execution of his scheme to defraud"?[1] This Court decided this identical question in the **Kann** case. The Government argued there, as here, that the fraudulent scheme did not end with the cashing of the checks by the defendant but continued until the checks were cleared back through the drawees' banks. This Court rejected that argument and held the scheme was completely executed when the checks were cashed, and thus the subsequent mailing of the checks between the banks, **although caused by the defendants**, was not in execution of the scheme to defraud.

> "The scheme in each case had reached fruition. The persons intended to receive the money had re-

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[1] The quoted language is from the opinion of the court below: "... the crucial question presented by this Appeal is whether the clearance of the duped investors' checks through National and the Federal Reserve Bank in St. Louis, was either a 'direct or indirect use of the mail' by Appellant *in execution of his scheme to defraud*, as established by the evidence here." 331 F. 2d at 292 (emphasis added).

ceived it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme as the statute requires." **Kann v. United States,** *supra,* at 94.

In the **Kann** case, an element of the offense was missing—"that the mailing be for the purpose of **executing** the fraud." In our case, an element of the offense is missing—that the mailing be "in **execution** of his scheme to defraud."

2. The Government argues that even if the principles of the **Kann** case require a reversal of the conviction, such principles from a mail fraud case should not apply in this Securities Act case "where the gist of the offense is fraud in the sale of securities, and the use of the mails or interstate facilities is merely the factor which supports federal jurisdiction." Govt.'s Brief at page 8.[2] The court below discussed the "gist" of the offense:

> "In other words, it is our opinion that a scheme to defraud, in relation to a sale of securities, **and the use of the mails in consummation thereof,** is the gist of the crime denounced by the Congress in Section 17 (a) of the Securities Act of 1933, supra" (Emphasis added). 331 F. 2d at 292.

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[2] The Government also attempts to distinguish between the statute involved in this case and the mail fraud statute by citing *United States v. Sheridan,* 329 U. S. 379 (1946). However, the distinction in the *Sheridan* case is one between the transportation in interstate commerce of forged checks (or stolen goods) and the transportation in inter-state commerce of fraudulently procured checks as in the *Kann* case and the present case. Thus the *Sheridan* case refutes rather than sustains the Government's contention that the statute in the *Kann* case is not analogous to the statute in the present case.

Thus, whatever the gist of the crime—whether broader, narrower or just the same as the mail fraud cases—the issue still is whether the mails were used in consummation of the scheme. This Court said in the **Kann** case, on facts identical to those involved here, that "it was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank," **Kann**, *supra*, at page 94. There is no valid reason for the court below to say the fraud was not consummated in the present case when this Court has said the fraud was consummated in the **Kann** case.[3]

3. The Government seeks to expand the federal criminal jurisdiction under the Securities Act beyond the meaning of the statute. Petitioner submits that a line must be drawn on this expansion and that the line in the **Kann** case—when the fraudulent scheme is complete—is a workable and sensible one. This Court in the **Kann** case said, with respect to mail frauds:

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." **Kann v United States**, *supra*, at 95.

Petitioner submits that the Securities Act criminal section involved in this case does not, on its face, purport to reach

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[3] The Government's reliance on *United States v. Sampson*, 371 U. S. 75 (1962), is misplaced. In *Sampson* this Court merely reiterated the principle that subsequent mailings to the victims by the defendants if made for the purpose of "lulling" the victims may be part of the defendants' scheme to defraud. However, the mailing between the banks in this case was not for the purpose of "lulling" the investors and in fact this Court in the *Kann* case distinguished such mailings between banks from the lulling cases "where the use of the mails is a means of concealment so that further frauds which are a part of the scheme may be perpetrated." 323 U. S. at 94-95.

all fraudulent transactions, but only those fraudulent security transactions in which interstate facilities or the mails are used in employing the scheme to defraud.

CONCLUSION.

For the reasons set forth herein and in the Petition for a Writ of Certiorari, petitioner prays that the Petition for a Writ of Certiorari should be granted.

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